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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee,	)	2 CA-CR 2007-0062
	)	DEPARTMENT A
v.	)	SUPPLEMENTAL MEMORANDUM DECISION
GLENN RAY PAXTON, SR., Appellant.	)	Not for Publication
	)	Rule 111, Rules of
	)	the Supreme Court

ON REMAND

Pima County Cause No. CR-20061094

Honorable Richard D. Nichols, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and William S. Simon — Phoenix
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
By Kristine Maish — Tucson

and

Barton & Storts, P.C.
By Brick P. Storts, III — Tucson
Attorneys for Appellant

H O W A R D, Presiding Judge.

¶1 After a jury trial, appellant Glenn Paxton was convicted of two counts of sale of a narcotic drug. On appeal, we held the trial court did not err in denying Paxton's motion to suppress identification evidence or in refusing to give two requested jury instructions. *State v. Paxton*, No. 2 CA-CR 2007-0062 (memorandum decision filed Jan. 14, 2008). Our supreme court has remanded this case for reconsideration in light of *State v. Cheramie*, 218 Ariz. 447, 189 P.3d 374 (2008). After reconsideration, we vacate paragraphs thirteen and fourteen of our previous decision. We supplement that decision as follows and affirm accordingly.

¶2 Paxton argues the trial court erred when it refused his request to instruct the jury on possession of a narcotic drug as a lesser and necessarily included offense of sale of a narcotic drug. He contends that, although the evidence supports a conviction for possession, the jury could have found the state failed to prove the element of sale or could have had another, unspecified reason for convicting him of possession only. We review a trial court's refusal to give a requested instruction for an abuse of discretion. *State v. Robles*, 213 Ariz. 268, ¶ 4, 141 P.3d 748, 750 (App. 2006).

¶3 A trial court is required to give a requested instruction on a lesser included offense when the party requesting the instruction shows that the lesser offense is also necessarily included based on the evidence. *State v. Wall*, 212 Ariz. 1, ¶ 14, 126 P.3d 148, 150 (2006). For an offense to be necessarily included, two conditions must be met: "The

jury must be able to find (a) that the State failed to prove an element of the greater offense and (b) that the evidence is sufficient to support a conviction on the lesser offense." *Id.* ¶ 18.

¶4 In *Cheramie*, the supreme court held that possession of a dangerous drug is a lesser included offense of transportation of a dangerous drug for sale arising from the same transaction because a person cannot "'transport' drugs without having possession of or dominion or control over them." 218 Ariz. 447, ¶¶ 9-12, 189 P.3d at 375-76. Similarly, a person cannot sell narcotic drugs without having possession of or dominion or control over the drugs to be sold. *See* A.R.S. § 13-3408(A)(1), (7); *see also In re Pima County Juv. Action No. 12744101*, 187 Ariz. 100, 101, 927 P.2d 366, 367 (App. 1996). Therefore, possession of a narcotic drug, § 13-3408(A)(1), is a lesser included offense of sale of a narcotic drug, § 13-3408(A)(7).

¶5 In this case, the state presented substantial evidence establishing all elements of sale of a narcotic drug. Two undercover police officers testified at trial, describing in detail the two transactions during which Paxton gave them crack cocaine in exchange for money.[1] Their testimony establishing the sale was no different than their testimony establishing the possession. In his opening brief, Paxton argues that, "for whatever reason" the jury could have decided to convict Paxton of only possession. But this is the

[1]One officer was present at both transactions. The second officer was present at only the second transaction.

"theoretical" hope rejected in *Wall* as a basis for a necessarily included offense instruction. 212 Ariz. 1, ¶ 18, 126 P.3d at 151.

¶6 Paxton also cites *State v. Celaya*, 135 Ariz. 248, 253, 660 P.2d 849, 854 (1983), for the proposition that the jury must be afforded a "less drastic alternative" to the choice between acquittal and conviction of the greater charge in order to obtain the full benefit of the reasonable doubt standard. But *Celaya* states only that the failure to give an instruction on a lesser included offense is reversible error when that lesser included offense "is reasonably supported by the evidence"—in other words necessarily included. *Id*. *Celaya* did not establish a separate test for when a lesser included instruction must be given. Because the evidence here did not support a conviction for only possession, the court did not commit reversible error in denying the instruction on possession.

¶7 Paxton also argues for the first time in his reply brief that, because the money exchanged for the drugs was not seized or admitted into evidence, the jury could find the state had failed to prove the element of sale. We generally do not address arguments raised for the first time in the reply brief. *See State v. Ruggiero*, 211 Ariz. 262, n.2, 120 P.3d 690, 695 n.2 (App. 2005). In any event, identifying this single piece of additional evidence that theoretically could have been produced does not show that a reasonable jury could have found only possession.

¶8 We can find no evidence or lack of evidence from which a reasonable juror could conclude that Paxton was guilty of possession but not sale. The trial court did not err in denying the instruction on possession.

¶9 In light of the foregoing, we affirm Paxton's convictions and sentences.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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J. WILLIAM BRAMMER, JR., Judge